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No. 95-1315

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

GENERAL PUBLIC UTILITIES CORP., METROPOLITAN EDISON CO., JERSEY CENTRAL POWER & LIGHT CO., PENNSYLVANIA ELECTRIC CO., BABCOCK & WILCOX CO., MCDERMOTT INCORPORATED, RAYTHEON CONSTRUCTORS, INC., BURNS & ROE ENTERPRISES, INC., DRESSER INDUSTRIES, INC.,

Petitioners,

VS.

JONATHAN W. DODSON, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

APPLICATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Nuclear Energy Institute, Inc., the Edison Electric Institute, the American Public Power Association, the National Rural Electric Cooperative Association, Arizona Public Service, Carolina Power & Light Co., Commonwealth

Edison, Consolidated Edison Co. of New York Inc., Detroit Edison, Duke Power Company, Duquesne Light Company, Entergy Operations, Inc., Florida Power & Light Company, Southern California Edison Co., Southern Nuclear Operating Company, Texas Utilities Electric Company, Inc., and Wisconsin Public Service (collectively amici or the amicus organizations) respectfully move for leave to file the attached brief *amicus curiae*. The consent of the attorneys for the petitioners has been obtained. The consent of the attorneys for the respondents was requested but refused.

As set forth more fully in the attached brief, amici have a pronounced interest in the sole question raised by the petition; namely, whether punitive damages that are intended solely to punish and deter (such as those authorized under Pennsylvania law) can be awarded in a tort case arising under and governed by the Price-Anderson Act (42 U.S.C. § 2210 *et seq.*). First, under the Third Circuit's construction of the liability shifting and cost spreading provisions of the Price-Anderson Act, many of the amicus organizations and their members potentially would be obligated to pay some or all of any punitive damages ultimately awarded in these consolidated actions.

Second, many of the amicus organizations or their members are themselves subject to claims for punitive damages in other lawsuits arising under and governed by the Price-Anderson Act, and/or potentially would be obligated to pay some or all of any punitive damages actually awarded in these other suits. Both the analytical framework used, and the resolution reached with respect to the punitive damages issue in the instant consolidated actions, will directly affect the resolution of the punitive damages issue in these other suits.

Finally, the punitive damages issue raises significant questions of federal law and national policy regarding the continued development and use of nuclear power, and the amicus

organizations believe the attached brief *amicus curiae* helps to demonstrate the importance of the issue and the need for this Court's intervention.

For these reasons, the amicus organizations request that the attached brief *amicus curiae* be accepted for filing.

DATED: March 21, 1996.

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BRIEF AMICUS CURIAE

I. STATEMENT OF INTEREST

A. Identification Of Amicus Organizations

Amici are comprised of the owners and operators of commercial nuclear electric utilities, organizations representing the owners and operators of all of the more than 70 nuclear power plants currently licensed to operate within the United States, and many of the utilities that purchase electricity generated by these power plants.

The Nuclear Energy Institute, Inc. (NEI) is the organization of the nuclear electric industry responsible for coordinating the combined efforts of all utilities licensed by the U.S. Nuclear Regulatory Commission (NRC) to construct or operate commercial nuclear power plants, and of other members of the nuclear industry, inter alia, in all matters involving generic regulatory policy issues and regulatory aspects of generic operational and technical issues affecting the nuclear energy industry. Every utility responsible for constructing or operating a commercial nuclear power plant in the United States is a member of NEI. In addition, NEI's members include major architect/engineering firms, all of the major nuclear steam supply system vendors, and many other NRC licensees.

Edison Electric Institute (EEI) is the association of the United States investor-owned utilities and industry affiliates worldwide. EEI's U.S. members serve 99 percent of all customers served by the investor-owned segment of the industry. They generate approximately 79 percent of all the electricity produced by electric utilities in the country and service 76 percent of all ultimate customers in the nation. Approximately 26 percent of the electricity generated by investor-owned utilities in the United States was fueled by nuclear power in 1994.

The American Public Power Association (APPA) is a national service organization representing municipal and other state or local government-owned electric utilities throughout the United States. APPA member utilities serve some of the nation's largest cities, such as Los Angeles, Sacramento, Seattle, Phoenix, Jacksonville, Austin, San Antonio, Nashville, Memphis, Cleveland, Omaha and Orlando. Several state public power agencies, such as the New York Power Authority, South Carolina Public Service Authority (Santee Cooper) and Lower Colorado River Authority in Texas, provide electric power to many communities within their states. In addition, APPA members include joint action power supply agencies and public power distributors. More than 2,000 public power utilities provide 14 percent of all kWh sales to ultimate customers in the United States. Approximately 1,870 (93%) of these utilities are municipally owned.

The National Rural Electric Cooperative Association is the national service organization representing nearly 1,000 nonprofit consumer-owned rural electric cooperatives providing electric power supply to about 30 million people in 46 states. Many of these cooperatives are co-owners of nuclear power plants or purchase electricity generated by such plants.

The following utilities that own or operate nuclear power plants individually join as amici because of their direct interest in the issue presented by the petition for certiorari: Arizona Public Service; Carolina Power & Light Co.; Commonwealth Edison; Consolidated Edison Co. of New York Inc.; Detroit Edison; Duke Power Company; Duquesne Light Company; Entergy Operations, Inc.: Florida Power & Light Company; Southern California Edison Co.; Southern Nuclear Operating Company; Texas Utilities Electric Company, Inc.; and Wisconsin Public Service. Together these utilities represent the ownership of approximately one-half

of all commercial reactors licensed to operate in the United States.

B. Interest In Pending Petition For Certiorari

The Price-Anderson Act creates an exclusive funding mechanism to pay any and all liability for injury arising out of exposure to radiation from the operation of private commercial nuclear power plants, and caps all such liability for a single nuclear incident at the amount of funds available through this mechanism. *See Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 64-67 (1978). At the time of the Three Mile Island ("TMI") incident, this financial protection system consisted of a $140 million primary layer of private commercial insurance, a $335 million secondary layer that is funded as needed by all then-existing commercial nuclear power plant licensees on a pro-rata basis per reactor (not to exceed $5 million per reactor per incident), and an $85 million tertiary layer funded as needed by the federal government. Today, due to the 1988 Amendments Act and the NRC implementing regulations, this funding mechanism essentially consists of a $200 million primary layer of private commercial insurance, and a secondary layer in excess of $8 billion that is funded as needed by all commercial nuclear power plant licensees on a pro-rata basis per reactor (not to exceed approximately $79 million per reactor per incident). *See* 42 U.S.C. §§ 2210(b), (o)(1)(E); 10 C.F.R. § 140.11(a)(4).

Amici have a direct pecuniary interest in the resolution of the issue presented by the petition for a writ of certiorari. The individual utility amici — together with various members of the other amicus organizations — are the licensees obligated under the Price-Anderson Act to fund the $335 million secondary layer applicable to the claims arising out of the TMI incident. Hence, although not parties to this action, the decision of the Third Circuit to permit punitive

damages claims to proceed could lead to these amici paying in large part any punitive damages award subsequently entered in the pending actions. *See In re TMI Litig. Cases*, 67 F.3d 1119, 1127 (3d Cir. 1995) (hereafter *In re TMI III*), *petition for cert. pending*, No. 95-1315. Amici thus have a much more direct and compelling interest in the outcome of the presently pending petition for certiorari than typical amici have in issues before this Court.

Moreover, the individual utility amici — together with various members of the other amicus organizations — are defendants and potential defendants in other Price-Anderson actions in which punitive damages are or will be sought, as well as the licensees obligated to fund the multi-million or multi-billion dollar secondary layers of financial protection applicable to those actions. Moreover, additional Price-Anderson suits seeking punitive damages are certain to surface in the future — no matter how safely the nuclear plants are operated — given that (1) nuclear power plants have collectively employed hundreds of thousands of workers, while millions of people live in the areas near the plants, (2) it is likely that at least 30 percent of these individuals — just as at least 30 percent of all Americans no matter where they work and live — will suffer from cancer in their lifetime, see American Cancer Society, *Cancer Facts and Figures — 1996* at 1 (1996), and (3) significant segments of the media and the public have a fear of the risks posed by commercial nuclear power operations that is not consistent with the scientific evidence. *See* "LIVING SCARED: Why Do The Media Make Life Seem So Risky," 1994 WL 2344604 (L.A. Times 9/13/94); *see also id.*, 1994 WL 2344553. Thus, the amicus organizations or their members also have a vested interest in this Court correcting the improper analysis employed by the Third Circuit before it is relied upon by other courts called upon to determine whether punitive damages of the type authorized by their

forum state are available in an action arising out of and governed by the Price-Anderson Act.

Because amici believe that the Third Circuit's decision is erroneous both in methodology and result, and in order to ensure that comprehensive national policies are consistently respected and to realize the national uniformity that is a goal of the Atomic Energy Act, amici urge this Court to grant the pending petition for certiorari.

II. ARGUMENT

A. The Court Of Appeals Improperly Abdicated Its Statutorily Mandated Responsibility To Determine Whether Punitive Damages Of The Type Authorized Under Pennsylvania Law Are Consistent With The Price-Anderson Financial Protection System

Although the Price-Anderson Act created a federally mandated pool of funds to compensate persons injured in a nuclear incident, as originally enacted it left it up to state tort law to provide the means by which the injured parties could establish a right to payment from those funds. *See Silkwood v. Kerr-McGee*, 464 U.S. 238, 251-53 (1984). Through the 1988 Amendments Act, however, Congress eliminated this direct reliance on state tort law. Instead, Congress created a new federal cause of action for "public liability" to serve as the sole vehicle for obtaining access to the financial protection system's funds. *See In Re TMI Litig. Cases Consol. II*, 940 F.2d 832, 854 (3rd Cir. 1991) (hereafter *In Re TMI II*), *cert. denied sub nom. Gumby v. General Public Utilities Corp.*, 503 U.S. 906 (1992).

As is often the case, Congress neither specified all the elements of this new federal cause of action, nor directed the wholesale adoption of state tort law causes of action as federal law. Rather, Congress expressly commanded that "the substantive rules for decision in such action shall be

derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [the Price-Anderson Act]." 42 U.S.C. § 2014(hh). Therefore, before applying state law, courts in "public liability" actions first must determine whether that state law is consistent with the Price-Anderson Act. Indeed, when first considering the 1988 Amendments Act during an earlier appeal in this same Three Mile Island Litigation, the Third Circuit itself recognized that "in every case alleging public liability, courts will be required to determine whether state law principles conflict with other parts of the Price-Anderson scheme." *In Re TMI II, supra*, 940 F.2d at 858; *accord O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1100-01 (7th Cir. 1994) ("As the Third Circuit noted in *TMI*, the Amendments Act places great weight on the necessity of the district court's determining whether state and federal law are consistent.").

Nevertheless, when faced with the question of whether punitive damages of the type authorized under Pennsylvania law are available in these consolidated actions, the Court of Appeals essentially concluded that there was no need to perform the very consistency analysis it previously stated was "in every case . . . required." Rather, the Court of Appeals concluded that both Congress in the 1988 Amendments Act itself, and this Court in *Silkwood v. Kerr-McGee Corp.*, had already determined that all punitive damages are consistent with the Price-Anderson scheme. *In Re TMI, supra*, 67 F.3d at 1124-25. As explained below, this conclusion was clear error.

1. Congress Has Made No Blanket Determination Regarding The Consistency Of The Price-Anderson Scheme With The Various Types Of "Punitive Damages" Potentially Available Under The Tort Law Of The Fifty States

In the decision below, the Third Circuit laid great emphasis on the fact that the 1988 Amendments Act contains an express provision prospectively eliminating punitive damages from cases involving persons (principally Department of Energy Contractors) for whom the federal government provides indemnity against liability. 42 U.S.C. § 2210(s). According to the panel, the failure of Congress to eliminate punitive damages altogether clearly evidences a Congressional determination that *no* type of punitive damages is inconsistent with *any* other aspect of the Price-Anderson scheme. *In Re TMI, supra*, 67 F.3d at 1124-25. The panel is mistaken.

The adoption of section 2210(s) itself sheds no light on the views of Congress regarding the consistency between any type of punitive damages and the Price-Anderson financial protection system. Section 2210(s) is no more and no less than an effort by Congress to ensure that the Price-Anderson Act's federal indemnification provisions did not anomalously waive federal sovereign immunity from punitive damages, contrary to long standing federal policy as articulated most clearly in the Federal Tort Claims Act. Indeed, the legislative history subsequently highlighted in the Third Circuit panel's opinion expressly states as much. *In Re TMI, supra*, 67 F.3d at 1126 (*quoting* S. Rep. No. 70, 100th Cong., 1st Sess. 27 (June 12, 1987), *reprinted in* 1988 U.S.C.C.A.N. 1424, 1440); *accord* S. Rep. No. 218, 100th Cong. 2d Sess. 12-13, *reprinted in* 1988 U.S.C.C.A.N. 1476, 1487-88; H. Rep. No. 99-636 Part 2, 99th Cong., 2d Sess. 12-13 (August 5, 1986). Section 2210(s) has absolutely

nothing to do with the policies underlying the Price-Anderson Act itself.

Nor did the failure of Congress to adopt a similar express prohibition of all punitive damages awards against commercial power plant licensees necessarily evidence — as the Third Circuit panel contended — that Congress determined all such damages are consistent with the Price-Anderson scheme. Rather, a more plausible explanation is that Congress — aware that remedies with at least partially compensatory purposes are included among the various types of "punitive damages" available under the laws of the fifty states[1] — simply declined to adopt any blanket approach and instead left it to the courts to evaluate consistency on a case-by-case basis. Indeed, this view is supported by the fact that the Congressional Committee that originally drafted the language now found in section 2210(s), *see* H. Rep. No. 99-636 Part 2, 99th Cong., 2d Sess. 12-13, 39 (August 5, 1986) (proposing as an amendment to then-existing bill the language now found in 42 U.S.C. § 2210(s)), appeared expressly to contemplate that "punitive damages" could include an element of compensation. *See* H. Rep. No. 99-636 Part 2, 99th Cong., 2d Sess. 16 (August 5, 1986) ("It is an irony of the law that 'exemplary' or 'punitive' damages

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[1] See, e.g., *Hofer v. Lavender*, 679 S.W.2d 470, 474-75 (1984) ("punitive damages" survive against estate of deceased tortfeasor because, among other reasons, they are intended in part to compensate the victim); *Perry v. Melton*, 171 W. Va. 397, 401 (1982) (same); *Kewin v. Massachusetts Mut. Life Ins. Co.*, 409 Mich. 401, 419 (1980) ("exemplary damages" are intended to compensate for "humiliation, sense of outrage and indignity"); *Kelsey v. Connecticut State Employee's Assn.*, 179 Conn. 606,615 (1980) ("punitive damages" are to compensate for legal fees and expenses); *Cox v. Stolworthy*, 94 Idaho 683, 691 (1972), overruled in part on other grounds 104 Idaho 897 (1983) (one of three categories of "punitive damages" awards is measured by "the added expense to which the plaintiffs were put but for which they were not reimbursed by the jury's award of compensatory damages").

are not awarded to punish the defendant but are awarded 'in the view of supposed *aggravation of the injury to the feelings of the plaintiff* by the wanton or reckless act of defendant.' ") (emphasis added); *see also id.* at 17 (comparing punitive damages to other types of "less tangible" damages such as pain and suffering, and loss of consortium). Because any quasi-compensatory type of "punitive damages" — as opposed to a punitive-only type of "punitive damages" — might be consistent with the general compensatory purposes and structures of the Price-Anderson Act, a more rational reading of the legislative history is that Congress concluded that a blanket prohibition was not warranted and that a case-by-case consistency determination by the courts makes more sense.

In sum, the Third Circuit erred when it ignored the express declaration of the Senate Committee responsible for the final bill containing section 2210(s) that it "intends no preference for or against the awarding of punitive damages in suits against [commercial licensees] be inferred from the inclusion of [section 2210(s)] in the bill." S. Rep. No. 70, 100th Cong., 1st Sess. 27 (June 12, 1987), *reprinted in* 1988 U.S.C.C.A.N. 1424, 1440. While Congress did conclude that the federal government as sovereign should never have to make payment for any type of "punitive damages" liability, and so enacted section 2210(s), Congress also expressly left it up to the courts to evaluate the consistency of each specific type of "punitive damages" with the various policies embodied in the Price-Anderson scheme.

2. This Court Did Not Determine In *Silkwood* Whether Or Not Any Type Of Punitive Damages Is Consistent With The Price-Anderson Financial Protection System

The Third Circuit panel also appears to have concluded — as did the District Court whose decision was

under interlocutory review — that the issue of consistency between punitive damages and the Price-Anderson financial protection system already was resolved by this Court in *Silkwood v. Kerr-McGee Corp. See In Re TMI III, supra*, 67 F.3d at 1122, 1124-25. In *Silkwood*, a pre-Amendments Act case involving a plutonium processing company *not* subject to the Price-Anderson Act, *see Silkwood, supra*, 454 U.S. at 251 & n.12, this Court determined by a five to four vote that the Atomic Energy Act did not preempt in radiation injury cases an Oklahoma statute authorizing punitive damages as part of its tort law. In particular, this Court rejected the argument that Oklahoma's statute was preempted because Congress had occupied the field of nuclear safety regulation. This Court reasoned that Congress could not have intended its occupation of the field of nuclear safety regulation to have this effect because the legislative history of the Price-Anderson Act (although not directly applicable) proves that Congress assumed "state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents." *Id.* at 256. This Court also rejected the argument that an award of punitive damages under Oklahoma law would conflict with the NRC's regulatory role or would frustrate the Congressional goal of promoting the peaceful use of atomic energy. *Id.* at 257-58.

The Third Circuit's conclusion that *Silkwood* disposes of the consistency issue raised below is erroneous for two principal reasons. First, *Silkwood* did not address or decide — either directly or indirectly — the issue of whether an award of punitive damages is consistent with the Price-Anderson financial protection system. Given that the defendant in *Silkwood* was not covered by that system, it is obvious why this Court did not address that point and that the issue of the consistency between an award of punitive damages and the federally mandated liability-shifting and spreading scheme was left to another day.

Nor did this Court even indirectly address this issue. While this Court did conclude that the then-existing legislative history of the Price-Anderson Act revealed a Congressional assumption that "state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents," *id.* at 256, this Court also expressly stated that this did not mean that punitive damages for radiation injuries *never* could conflict with federal law:

> *We do not suggest that there could never be an instance in which the federal law would pre-empt the recovery of damages based on state law.* But insofar as damages for radiation injuries are concerned, preemption should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed *but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law.*

Id. at 256 (emphasis added). Although this Court "perceive[d] no such conflict or frustration *in the circumstances of this case," id.* (emphasis added), the inapplicability of the Price-Anderson Act to the defendant in *Silkwood* means that those "circumstances" by definition did not include the shifting and spreading of punitive damages liability through the Act's financial protection system. Therefore, nothing in *Silkwood* even indirectly addresses the issue of whether any type of punitive damages liability is consistent with the financial protection system, the issue squarely before the Court in this case.

Second, the Third Circuit's reliance on *Silkwood* also is misplaced because the issue of whether to permit punitive damages in that case was decided against an entirely different legal background than that of the presently pending petition. *Silkwood* involved the issue of whether federal law

preempted independent state law operating of its own force, and was decided against the backdrop of a perceived Congressional assumption that state tort remedies shall operate "in whatever form they might take." Thus, although this Court recognized a certain "tension" between exclusive federal regulation of nuclear safety and the state law punitive damages remedy, both federalism concerns and concerns over proper judicial deference to Congress combined in *Silkwood* to lead a bare majority of this Court to find no preemption. *See id.* at 256-57; *see also id.* at 248 (review important because issue "affects . . . the States' traditional authority to provide tort remedies to their citizens").

By virtue of the 1988 Amendments Act, however, Congress chose to federalize the entire area of radiation injury law, *see In Re TMI II, supra*, 940 F.2d at 854-55; *accord O'Conner, supra*, 13 F.3d at 1099-1100, and *expressly directed* that state-law remedies be borrowed as federal law *only* to the extent they are not inconsistent with the Price-Anderson Act. In other words, neither *Silkwood*'s federalism-based reluctance to displace independently operating state law, nor *Silkwood*'s reluctance to overturn the then-existing Congressional determination to utilize state tort remedies "in whatever form they might take," has any application to the present actions.

The standard of "inconsistency" that must be applied in these consolidated actions therefore is different from and not as stringent as *Silkwood*'s requirement of irreconcilable conflict or frustration of purpose in order to find preemption. As the Seventh Circuit has observed, "the Amendments Act makes pointedly clear that any tension between federal standards and state liability standards . . . is to be resolved so as to avoid inconsistency with the Price-Anderson Act." *O'Conner, supra*, 13 F.3d at 1105 n.13. The Third Circuit thus erred in failing to undertake this new analysis.

B. Punitive Damages Designed Solely To Punish And Deter, Such As Those Authorized Under Pennsylvania Law, Are Not Consistent With The Price-Anderson Scheme

Given that the Third Circuit improperly abdicated its responsibility to carefully weigh the consistency of the punitive damages remedy afforded by Pennsylvania law and the Price-Anderson scheme, it never fully addressed the clear incongruities created by permitting such a remedy in these consolidated actions. The petition for certiorari already details many of these incongruities, *see* Petition for Certiorari at 15-26, and amici will not repeat those points here.

C. A Failure Of This Court To Grant Review At This Time Will Impose Needless Cost And Uncertainty Upon The Entire Nuclear Industry In Contravention Of The Purposes Behind The Price-Anderson Act

Amici believe that there is a great need for immediate intervention by this Court to correct the Third Circuit's erroneous analysis and decision. Amici recognize that no punitive damages have yet been awarded in the pending consolidated actions. However, as explained in part I.B above, several of the individual utility amici currently are defending against punitive damages claims in other cases alleging injuries caused by radiation exposure arising under and governed by the Price-Anderson Act, and more such cases certainly can be expected. Absent the claims for punitive damages, conduct evidence would be largely irrelevant in these cases because a licensee's duty of care principally is defined in terms of compliance with the numerical permissible radiation dose limits established by the NRC, rather than in terms of "reasonableness". *See, e.g., In re TMI Litig. Cases*, 67 F.3d 1103, 1113-15 (3d Cir. 1995), *cert. denied*, ____ U.S. ____ (1996). However, if punitive

damages claims are permitted, millions of additional dollars necessarily must be spent on marshalling the documentary, percipient witness and expert witness evidence regarding licensee conduct — dollars that would come out of the limited Price-Anderson Act funds. 42 U.S.C. § 2014(k). A decision by this Court correcting the Third Circuit's faulty analysis and conclusion could eliminate this pointless effort, at least in cases brought in States with punitive-only type "punitive damages" like those authorized by Pennsylvania law.

III. CONCLUSION

For all the reasons set forth above, amici respectfully request that this Court grant the pending petition for certiorari.

DATED: March 21, 1996.

Respectfully submitted,

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